IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2682 OF 2004

M/s.Shalimar Paints Ltd.,)
a Limited Company incorporated)
and duly registered under the)
Companies Act, 1956 having its)
registered office at 13, Camac)
Street, Kolkata-700 017)
inter alia having its Branch)
office at Hamilton House, 1st)
Floor, J.N. Heredia Marg,)
Ballard Estate, Mumbai-400 038.).....Petitioner

Versus

1. The Asstt. Provident Fund)
Commissioner, Office of)
the Regional Provident Fund)
Commissioner, Bhavishya Nidhi)
Bhavan, 341, Bandra (East),)
Mumbai-400 051.)
2. Union of India)
Copy to be served upon)
Joint Secretary, Ministry)
of Law & Justice,Iykar Bhavan)
New Marine Lines,)
Mumbai-400 020.)..Respondents

Mr. O.S. Kutty, for the Petitioner
Mr. M.S. Karnik, for the respondents.

CORAM: F.I. REBELLO, J.
DATE :6th October, 2004

ORAL JUDGMENT:

. Rule. Heard forthwith.

2. By the present petition the petitioners impugn the order dated 5th May, 2004 whereby the Assistant Provident Fund Commissioenr has directed the petitioners to pay the amount as set out in the said order. The principal challenges urged before this Court are: (1) that there is no finding recorded that the workmen are the employees of the petitioner. In fact there are disputes pending for regularisation of the said workmen; (2) the provisions of Section 7A of the Employees Provident and Miscellaneous Provisions Act, 1952 are

mandatory. The petitioner herein was given no opportunity as required considering the Scheme of Section 7A and in the light of that the order is liable to be set aside and (3) material submitted by the Union was considered which was not made available to the petitioners and as that material was considered for recording a finding adverse to the petitioners on that count also the order is liable to be set aside.

3. On the other hand on behalf of the respondents learned Counsel contends that even the workmen of a contractor are also covered by the definition of "employee" which is an extended definition. Once there is a relationship between the petitioner and the workmen of employee and employer it was open to the respondents to have passed the impugned order. It is then contended that the petitioner was given an opportunity. The petitioner failed to produce records and now cannot complain that the order has been passed without giving an opportunity. Lastly, it is contended that, for the period between July, 1987 to October, 1990 the Union had made available the records including Muster Rolls. These were considered for the purpose of finally arriving at or computing the demands of the petitioner herein.

4. Having heard learned Counsel, I am of the opinion that the impugned order is liable to be set aside. It is true that the respondent authority is not bound to go strictly by the definition of "employee" as known in ordinary parlance. What he has to consider is the extended meaning given under Section

2(f) of the Provident Fund & Misc. Provisions Act. However, a finding will have to be recorded that they are employees for the purpose of the Act so that a direction can be issued to the employer to make contributions. Though there is some discussion in the order there is no finding recorded to that extent. The 1st respondent is, therefore, directed also to record a finding as to whether the persons on whose account the amount was claimed are 'employees'.

5. Section 7A contemplates an enquiry. That enquiry contemplates giving an opportunity to the employer and if required to try the matter by calling for records and examining witnesses as can be seen from Sub-Section 3(2). Sub-Section 3 provides that no order shall be made under Sub-section (1) unless the employer concerned is given an opportunity of leading its case. In the instant case show cause notice was given. The petitioner replied to the said show cause notice. Thereafter it appears that no enquiry was conducted. Issue of show cause notice and mere reply by itself would not amount to an enquiry. An enquiry would contemplate an investigation of the material produced and decision thereof by respondent No.1 under Section 7A of the Act. It is only in the event there is an admission by the employer, then only the enquiry can be dispensed with or there are documents which are admitted by the employer and no further enquiry is required. Otherwise an enquiry must be conducted in terms of law. That having not been complied with the order to that extent is also liable to be set aside.

6. Lastly in so far as the contention raised that

material has been used which were not made available the requirements of natural justice require that before any material is used such a material must be made available to the party against whom it is used. This is more so in the case of documentary evidence produced by the Union. There seems to be failure on that count also and consequently the order is liable to be set aside.

7. In the light of that the impugned order is set aside. The respondent No.1 is directed to hold a fresh enquiry by following the proper procedure and giving an opportunity to the petitioners. The petitioner to appear before the respondent No.1 on 14th October, 2004 at 11.00 a.m.. The respondent No.1 thereafter to take further steps for disposal of the matter according to law.

8. Rule made absolute accordingly. In the circumstances of the case no order as to costs.

. Parties/Authorities to act on an ordinary copy of this order duly authenticated by the Associate/Personal Secretary of this Court.

(F.I.REBELLO, J.)